NO. 19,702

UNITED STATES

COURT OF APPEALS

for the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

vs.

SECURITY PLATING COMPANY, INC.,

Respondent.

On Petition for Enforcement of an Order

of the National Labor Relation Board

PETITION FOR REHEARING

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PETITION FOR REHEARING

Respondent respectfully petitions for rehearing. This petition deals only with the Labor Board's finding of unlawful refusal to bargain collectively and its order requiring respondent to bargain with the Union as exclusive representative of employees.

1. The Lack of Evidentiary Support for the Union's Majority Claim: The Union had a paper showing of majority based on "authorization" cards. At best, such cards are less reliable than an election as a means of ascertaining employees' wishes. 1/ In this case, as the opinion of February 15, 1966, states, the cards "were in English, a language which many of those who signed were unable to read." In these circumstances the cards did not have even presumptive validity, and it became important to find out what employees were told about the cards when they signed.

As the February 15, 1966, opinion noted, there was evidence to the effect "that the Union organizer misrepresented the cards as simply a necessary preliminary to an election." Cards signed on the representation that they are "just for an election" should not be counted in support of a union's claim of majority: N. L. R. B. v. Koehler (C. A. 7) 328 F. 2d 770.

The opinion of February 15, 1966, also states: "However, there was also evidence that the meaning and import of the cards were carefully and correctly read and explained to such employees in a language that they understood." This evidently refers to the testimony of the Union organizer

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1/ N. L. R. B. v. Johnnie's Poultry Co. (C. A. 8) 344 F. 2d 617, quoting the Board Chairman for statistics showing that unions with a paper majority based on cards are often rejected by employees when they are permitted to vote under the protection of a secret ballot.

Lopez, who testified: "We read off the card and explained to them thoroughly what these cards meant." (Tr. 323.) This was merely his conclusion, worthless as evidence. Continuing with his version of what he had told employees, Lopez testified: "Only two people see these cards. That is the person that signs it and the union when they receive it. After that when we have the sufficient number we can file for a representation with the Board. We turn them into the Board and they see them, but these cards are totally secret." (Tr. 323.) This evidence is consistent with the testimoney given by respondent's witness Valenzuela to the effect that Lopez told employees the cards were "just for an election" (Tr. 245.) Neither Lopez nor anyone else denied the statement attributed to him by Valenzuela. If, as Lopez said, the cards were to be shown only to the Board, then their only purpose was to bring about an election. (The Board requires the confidential disclosure of a 30% prima facie showing on cards in order to process an election petition.)

On the evidence, it is clear that many employees were told that the cards were "just for an election." In these circumstances the cards did not constitute substantial evidence in support of the Union's majority claim.

2. The Reasonableness of Respondent's Doubt of the Union's Majority Claim: If it is assumed (without substantial evidentiary support) that the Union had a majority, the next question is whether that was brought home to respondent in any way so as to invoke the duty to bargain. The Board did not hold an election, and no cards were shown or even offered to respondent moreover, under the promise of secrecy which the Union made to the card-

signers, the cards would not have been shown to the respondent if it had asked for them. According to the Board the respondent was obliged to bargain with the Union as majority representative without any showing of representation or offer of any such showing, and even though notice of the Union's election petition reached respondent before the Union's bargaining demand.

The Board concedes that good faith doubt of a union's majority claim excuses an employer from bargaining with a union, regardless of its majority status. But the Board customarily finds (as it did here) that the employer did not have a good faith doubt because he had done something or other which the Board is able (as it usually is) to find an "unfair labor practice." That is absurd. Whatever one's conduct may be, he may have a good faith doubt based on the available information, or lack of it. To deprive an employer of the benefit of a good faith doubt because he has committed an "unfair labor practice" is simply punitive, without any rational basis. 2 /

As noted in the opinion of February 15, 1966, the facts of N. L. R. B. v. Dan River Mills (C. A. 5) 274 F. 2d 381, are similar to those of the instant case. But the result announced in the instant case is just the opposite of the result in the Dan River Mills case. The difference is said

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2 / N. L. R. B. v. Overnite Transportation Co. (C. A. 4) 308 F. 2d 279, 28 may be read for the proposition that an employer who opposes union organization of his employees thereby admits the truth of a union's majority claim. If so, then with all respect we suggest that the notion ought to be entered for the non-sequitur prize. On that theory, if A says to B, "I can whip you," then if B puts up his dukes he thereby admits that A can whip

to lie in "controlling facts" present in the Dan River Mills case, namely, that in that case " 'the employer immediately... disputed /the union's majority status/' by expressly stating its doubt in a letter to the Union and the Board." But in the Dan River Mills case the employer was replying to a union letter which had proposed a card check and other alternative methods of verifying the union's majority claim. In the instant case, however, the union made no such proposal; it merely demanded recognition. And the intervening notice of the filing of the election petition anticipated the employer's doubt and indicated that an election (as the only procedure proposed by anyone) was being sought to resolve it; accordingly, no reply was called for. As in the Dan River Mills case, the previous notice of the filing of the petition made it "reasonable for the Employer to assume that the law would resolve his good faith doubt concerning the Union's majority by the election requested..." We respectfully suggest that in the Dan River Mills case the employer's self-serving letter was not a "controlling factor, nor should it have been. (If the respondent here had been represented by counsel earlier such a self-serving letter would probably have been sent, but it would have made no difference at all to the Union or the Board.)

In these circumstances the respondent ought not to be penalized because it did not ask the Union to prove its claimed majority by some means other than the election for which the Union had petitioned even before its bargaining demand reached the respondent. 3/ In any event the

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3/ N. L. R. B. v. Downtown Bakery Co. (C. A. 6) 330 F. 2d 921: "In its briefs the Board emphasizes the fact that the respondent did not request /the union/ to prove its majority status. In Stoner Rubber Co., Inc., 123 NLRB 1440, the Board correctly notes that 'proof of majority status is peculiarly within the special competence of the union.' It would seem then that the burden of coming forward with proof of its alleged majority status was upon the union. The employer... in these circumstances should not be held accountable for its failure to request of /the union/ proof of its claimed majority status."

omission of the respondent in this case to demand proof of the Union (said to distinguish this case from Edward Field, Inc. v. N. L. R. B. (C. A. 2) 325 F. 2d 754) meant nothing in the circumstances of this case, for the Union had promised card-signers that the cards would be seen only by the Union and the Board; otherwise, they would be kept "totally secret" (Tr. 323. Accordingly, if the respondent had demanded proof none would have been furnished. The respondent ought not to be penalized because it did not make a futile demand. The law does not require idle acts: Calif. Civil Code, Sec. 3532. And in situations where a demand would ordinarily be required, it is unnecessary if it would be futile: Cook v. Snyder, 16 Cal. App. 2d 587 61 P. 2d 53. (California authorities are citedhere because of their accessibility; as State law of course they are not binding on this Court, but their good sense transcends the Federal supremacy.)

Conclusion: The Board's finding of unlawful refusal to bargain and its bargaining order are not supported by substantial evidence on the record considered as a whole, according to the standard of review prescribed by the statute (Sec. 10(c),) as authoritatively interpreted: N. L. R. B. v. Universal Camera Co., 340 U. S. 474. This petition for rehearing should therefore be granted and the Board's bargaining order should be set aside.

Respectfully submitted,

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Certificate of Counsel

In my judgment the foregoing Petition for Rehearing is well founded and it is not interposed for delay.

Richard A. Perkins

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